

6 Official Opinions of the Compliance Board 127 (2009)

Closed Session Procedures – public vote shortly before closed meeting during same session satisfied Act

Closed Session Procedures – Written Statement – disclosure of contractual matter, citing statutory authority and noting attorney-client privilege satisfied Act

Closed Session – Written Statement – Personnel Matter – document need not name appointee

Compliance Board – Authority and Procedures – complainants should be limited to requirements of the Act

Exceptions Permitting Closed Sessions – Legal Advice – session initiated by counsel where public body aware of general subject matter allowed

Exceptions Permitting Closed Session – Legal Advice – substantive decisions by public body as to content of contract beyond exception

Exceptions Permitting Closed Session – Legal Advice – public body entitled to meet with counsel to review prior legal advice counsel had provided

Minutes – Closed Session Statement – failure to report required information as single item violated Act

Open Session – meeting must be conducted in manner that public, as a practical matter, is aware of actions taken

June 25, 2009

Craig O'Donnell
Kent County News

The Open Meetings Compliance Board has considered your complaint that the Board of County Commissioners of Kent County violated the Open Meetings Act in multiple respects. For the reasons below, we find that the Commissioners practice of signing unidentified documents during the course of a public meeting is inconsistent with the Act. We find that, in two cases, the Commissioners action in meetings closed to consult with counsel appears to have exceeded that permissible under the Act. We also find that the manner actions taken during closed session are reported in publicly available minutes and the failure to submit to the Compliance Board a statement concerning a closed statement following an objection resulted in violations. However, remaining allegations in the complaint lack merit.

I

Bay Broadband Contract

A. Complaint

The complaint noted that on May 20, 2008, the County Commissioners voted at 10:00 a.m. to close a meeting at some indeterminate time later that day under §10-508(a)(7)¹ to discuss the “Bay Broadband contract renewal.” According to your complaint, you were told by the County Administrator that the County Attorney requested the closed session, thus, she assumed there was a valid legal reason. You alleged that the County Commissioners violated the Act in that they were unaware of the justification for closure at the time of the vote. You also indicated the presence of two staff members during the closed session, the County’s Information Systems Director and Water and Wastewater Director, suggest the purpose was not “legal advice.” You further noted that the County Commissioners had an obligation under the Act to send to the Compliance Board a copy of the written statement prepared in closing the session in light of your objection.

Your complaint also referred to a meeting closed under §10-508(a)(7) on April 29, 2008, concerning the same contractual matter. Staff members also attended this meeting. As we understand your complaint, you object to the County Commissioners’ justification for closure, *i.e.*, “attorney client privilege.” You characterized this explanation as mere “boilerplate” which does not satisfy the disclosure requirements of the Act when sessions are closed in connection with a contractual matter. (The complaint alleged that there is a pattern of such disclosures involving contractual matters.) According to the complaint, the “closed session was illegal, absent more complete and compelling reasons that make the need for confidentiality abundantly clear to those who attended the meeting.” The complaint also questioned the ability to conduct a closed session on a new contract or contract renewal without prior public discussion.

B. Response

In a timely response on behalf of the County Commissioners, Thomas Yeager, Esquire, denied any violation of the Act. The response outlined the County’s contractual relationship with Bay Broadband Communications

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

(“BBC”). Because the existing agreement had expired and there was a need for increased broadband support, the matter was referred Mr. Yeager, the County’s attorney. According to the response, on April 29, 2008, the County Attorney met with the County Commissioners to provide legal advice and receive direction from the client regarding a new agreement with the BBC. The County’s Information Services Director as well as the County’s Water-Wastewater Services Director, whose agency’s operations were significantly dependant on BBC’s services, were in attendance during the closed meeting. The response acknowledged that the closed session May 20, 2008, concerning the BBC agreement, was initiated by counsel. The purpose was to “give legal advice and receive informed direction from the commissioners for drafting the agreement with BBC.”

Included with the response was the County Commissioners’ closing statements and a copy of the relevant provisions of the sealed minutes of both closed sessions.² According to the response, “[a]s the minutes of the closed session[s] indicate, the conversation with counsel was confined to a discussion of the legal issues involved with the agreement the attorney was working on.”

The response challenges the complainant’s asserted standard for closing a meeting under the Act as not supported by the Act or Compliance Board precedents. “Certainly the advice of the County Commissioners’ own attorney that a closed meeting is needed in regard to a known legal matter that attorney was handling would provide ... a *bona fide* basis for believing a closed meeting is appropriate....” The response also argued that the written statements relied on in closing the meetings satisfied the Act, in that reference to the Bay Broadband negotiations or agreement identified the specific topic of discussion and the reference to “attorney-client privilege” identified the underlying legal privilege justifying the closed session.

C. Analysis

1. Initiation of Closed Session - May 20, 2008

The gist of your complaint in connection with the May 20, 2008, closed meeting appears to be that it was initiated by the County Attorney rather than the County Commissioners. To be sure, we have previously advised that a public body is not permitted to close a meeting absent a *bona fide* basis for

² Unless the public body chooses to make minutes of closed sessions public, the Compliance Board is required to maintain the document’s confidentiality. §10-502.5(c)(2)(iii).

believing that the ensuing discussion will fall within a permissible exception. 5 *OMCB Opinions* 172, 174 (2007). Here the closed session was initiated at the request of the County Attorney. However, the County Commissioners had sufficient information to close the session at the time the vote in favor of closure was conducted as evidenced by the written statement submitted along with the response. Clearly, the County Commissioners were entitled to rely on their legal counsel about the need for a closed session to consult with counsel with respect to the Bay Broadband agreement he was working on. If the attorney felt there was need to advise his client on a legal matter, we would expect him to initiate a closed meeting. As we have previously advised, there are occasions where a public body may be unaware of the need for legal advice until the attorney points out the need for consultation. 3 *OMCB Opinions* 345, 348 (2003). The suggestion that a closed meeting might not be initiated on advice of counsel simply lacks merit.

The presence of department heads at the time of the closed session does not support the suggestion that the discussion did not involve legal advice. Both of the departments had an interest in the provisions of the agreement. It is highly probable that they could contribute to the discussion, providing context for whatever legal concerns the attorney wished to raise.

2. Topic of discussion - May 20, 2008

We are told in the County Commissioners' response that the purpose of the closed session was not only to offer an opportunity for counsel to provide legal advice, but to receive direction from the Commissioners as to the contract that counsel was preparing. Like all the exceptions under §10-508(a), the exception authorizing closure of a meeting for legal advice must be narrowly construed. §10-508(c); 6 *OMCB Opinions* 77, 81 (2009). We have long held that once advice by an attorney has been provided, a public body must return to open session to discuss policy implications of the advice it had received. 1 *OMCB Opinions* 145, 149 (1995). In that opinion, we noted that a public body's direction to have an ordinance drafted and instruction to a municipal attorney to prepare the draft ordinance went beyond obtaining legal advice. *Id.* In a different context, we drew a distinction between an attorney's role in providing legal advice in connection with a proposed agreement with a developer versus situations where an attorney serves in a role as the public body's negotiator in connection with a contract. 5 *OMCB Opinions* 130 (2007). While the former could properly be handled in a closed session under the Act, a public body could not use the latter as justification to discuss policy issues about the deal in a closed meeting even though the attorney was present.

Id. Thus, the fact that an attorney requested a closed meeting does not necessarily mean the meeting involved rendering legal advice.

In interpreting §10-508(a)(7), we have not tied its application to the technicalities of whether there is an attorney-client privilege. *Id.* Nevertheless, we recognize that when an attorney prepares a document for a client, an attorney-client privilege might exist. 1 Restatement (Third) of The Law Governing Lawyers §72 comment b. (2000). Thus, the line is a fine one. If the County Commissioners were merely providing instruction that would be necessary in order that counsel could complete a draft agreement for the Commissioners's subsequent consideration, and the Commissioners wished to maintain the applicable privilege, we might find that no violation had occurred.

In this case, it would appear that the closed session consisted mainly of counsel setting forth options for the Commissioners to consider affecting the drafting of the contract. However, it appears that the Commissioners also acted on the recommendations, instructing counsel to finalize a document for presentation to Bay Broadband for its consideration. Assuming that Bay Broadband agreed to the terms, the contract apparently would then come back to the County Commissioners for approval. Nevertheless, to the extent that the Commissioners gave final instructions to counsel as to what they felt should be included with respect to the substantive terms of the proposed agreement, we find the County Commissioners crossed the line and acted beyond the confines of §10-508(a)(7).

3. Procedural Requirements

The complaint suggested that the May 20 meeting was improperly closed because the vote was not taken immediately before the closed session. At 9:55 a.m., the County Commissioners adopted a series of motions to consider several issues in closed session. Although it is not clear what time the meeting was actually closed, the closed sessions were completed by 10:45 a.m. As we have previously recognized, addressing multiple topics in closed session at a single time is a convenience to the public. Clearly, this was not a situation where a public body voted to hold a closed session at a prior meeting – a practice we have found inconsistent with the Act. *See, e.g., 3 OMCB Opinions 4, 6 (2000).* If the closed session did not begin immediately, it did start shortly after the vote. The Commissioners in attendance would be clearly be accountable for the vote. And members of the public who might wish to object to the closure would not have been prejudiced by the timing. Thus, as to the timing of the vote, we find that no violation occurred.

The complaint also alleged that the County Commissioners violated the act by failing to submit to the Compliance Board a copy of the written statement prepared in closing the meeting when the complainant objected to the closed session. The County Commissioners did not address this specific allegation in its response. The Act provides that “[i]f a person objects to the closing of a session, the public body shall send a copy of the written statement required under [§10-508(d)(2)(ii)] to the Board.” §10-508(d)(3). Although this document does not in itself trigger any action by the Compliance Board, the failure to submit it constituted a violation of the Act. 1 *OMCB Opinions* 13, 15 (1992).

4. Closed Session - April 29, 2008

The gist of the complaint in regard to the closed session held on April 29, 2008, appears to focus on the level of information made public as part of the written statement required under §10-508(d)(2)(ii). In completing a standardized form used by the Commissioners, the presiding officer checked §10-508(a)(7), “To consult with counsel to obtain legal advice on a legal matter.” Under the heading “topics to be discussed,” he indicated “Bay Broadband agreement - renewal” and under the heading “reason for closing” he indicated “Attorney client privilege.” In multiple opinions, we have indicated that the information included in the statement must go beyond parroting the applicable statutory exception; however, we have also advised that a public body is not expected to reveal a level of detail so as to compromise the basis for closure. *See, e.g., 6 OMCB Opinions* 77, 82 (2009). The goal is to allow the public to evaluate compliance by comparing the statutory justification with the reported topic. *Id.* Read in its entirety, the statement advised the public that the County Commissioners intended to confer with counsel to obtain legal advice in closed session to preserve the attorney-client privilege in connection with the renewal of an agreement with Bay Broadband. In our view, the disclosure satisfied the minimal requirements of the Act. *Cf. 4 OMCB Opinions* 188, 195-96 (2005). The complainant’s suggestion that a closed session must be preceded by public discussion of the contract is without merit.³

³ The complaint also included a general allegation that the form used by the County Commissioners in closing a meeting does not include a line for recording the time of closure. The response addressed why this item was eliminated. While the sample form found in the *Open Meetings Act Manual*, Appendix C, published by the office of Attorney General, includes a place to record the time, the short answer is that this item is not required on the written statement. *See* §10-508(d)(2)(ii).

II

Developer's Request for Allocation Refund

A. Complaint

The complaint also alleged that the County Commissioners violated the Act in connection with a closed session under §10-508(a)(7) relating to an interpretation of a Public Works Agreement that was prompted by a developer's request for a refund for allocations the developer had acquired. The complainant explained the concern as that the "request ... concerned both action on a contract, and an underlying policy issue (no-refunds under public works agreements) that seem to be inextricably wound up together." You indicated that you "are not sure that the interpretation was so sensitive that it had to be discussed in closed session." Based on a subsequent comment by a County Commissioner, you alleged a violation of the act in that the decision to not offer a refund was never reported in the minutes subsequent to the closed session.

B. Response

The response reviewed the background of the request for a refund of the fees paid for seven water and sewer allocations. The County's Water-Wastewater Director had asked the County Attorney for an opinion addressing the refund issue under the agreement. The County Attorney responded to the County Commissioners, recommending against refunding the fees, before the Commissioners' meeting on April 29. This issue was addressed during a public meeting on April 29, and one Commissioner indicated that he had a "slight problem with not refunding allocation fees," and a decision was deferred until the Commissioners met with their attorney. The Commissioners met with counsel later that day, and after discussing the legal opinion, a decision was made to deny a refund. Copies of the applicable closing statement, minutes of the public session, April 29, and minutes of the closed session were provided with the response.

The response also argued that the publicly available minutes of that day's session satisfied the disclosure requirements under the Act. Noting that the County Commissioners' practice of producing minutes arranged topically to the extent practicable, the response indicated that, as the minutes reflect, "the [C]ommissioners stated they wanted more time to consider the request and that '[l]ater in the day, and based upon the recommendation of the County Attorney, the Commissioners denied this request.'" The response specified

where the remainder of the required information pertaining to the closed session could be found in the minutes and that “[i]t is the County Commissioners’ *bona fide* belief that their manner of reporting publicly the decisions they reach informs the public as the Act intends and requires.”

C. Analysis

1. Propriety of Closed Session

The County Commissioners were clearly entitled under the Act to meet with their legal counsel in closed session to seek advice on the proper interpretation of the agreement or to discuss an opinion counsel had issued in connection with the agreement. The fact that the results might have policy implications does not alter this right. While you point out that the interpretation does not appear “sensitive,” this is not a factor that a public body need consider is exercising its right to close a meeting for consultation with counsel.

However, for the reasons explained above, we find that a violation occurred when the County Commissioners reached a final decision to reject the refund request during the course of the closed session.

2. Minutes

The question remains whether the publicly-available minutes reporting on the closed session satisfied the Act. Following a meeting closed under §10-508, certain information must be made available to the public in connection with the closed meeting. The Act provides:

If a public body meets in closed session, the minutes for its next open session shall include:

(i) a statement of the time, place, and purpose of the closed session;

(ii) a record of the vote of each member as to the closing of the meeting;

(iii) a citation of the authority under [the Act] for closing the session; and

(iv) a listing of the topics of discussion, persons present, and *each action taken during the closed session*.

§10-509(c)(2) (emphasis supplied).⁴ On page 9 of the minutes for the Commissioners' April 29 meeting, the closed session is reported; however, this section does not disclose the Commissioners' action. To be sure, page 4 of the minutes, where the request for a refund is discussed, reflect that, "[l]ater in the day, based upon the recommendation of the County Attorney, the commissioners' denied th[e] request." However, like other procedures under the Act pertaining to closed meetings, the disclosure requirements under §10-509(c)(2) are intended to allow the public an opportunity to monitor the propriety of closed meetings. Thus, in our view, in fairness to the public, information reported about a closed session must be reported in a single place.

Reading the minutes alone, it would not necessarily be clear that the Commissioners' decision was reached during the course of the closed session.

III

County Attorneys' Compensation

A. Complaint

On May 6, 2008, the County Commissioners held a closed session under §10-508(a)(1) for "consideration of requests by four individual employees or appointees for increased compensation and benefits..." According to the complaint, at the time of the vote to close the meeting, "it was discussed in passing that one of the items was the compensation for [County Attorney] Tom Yeager..." However, "based on the record the public is left to guess that Mr. Yeager is the 'appointee' in question." The complaint alleged that any discussion about Mr. Yeager's employment contract was illegal, as were any discussions about his pay level or "benefits." "Only his job performance particulars would be legitimate reason for closing." "[P]ersonnel confidentiality is not a reason; it is a restatement of the statutory exception and as such violates the Act."

⁴ We have long approved the County Commissioners' practice of reporting the information in the publicly-available minutes of a meeting the same date as long as the public is aware of the practice rather than in the minutes of the subsequent meeting. This practice expedites the availability of the information concerning a closed session to the public. *See, e.g., 3 OMCB Opinions* 264, 270 (2003).

The complaint referred to a prior situation, on April 17, 2007, when the County Commissioners discussed during a closed session the compensation rate for Alice Ritchie, Esquire, who represents the County's Board of Zoning Appeals. You alleged that "closing [the] session to discuss a new contract proposal or amendment [was] a violation of the Act." While the minutes documented the decision to approve a certain rate for handling a certain appeal, the minutes failed to reflect the action was taken during the closed session.

B. Response

The response reviewed the background leading to the closed session involving the County Attorney's compensation. Because the County Attorney is an "appointee" of the County Commissioners, "there is no question that the closed session was not a violation of the Act." The response further noted that requiring disclosure of the name would defeat the desired confidentiality the Act intended to protect. As to the suggestion that discussion of pay level is illegal, the response noted that the complaint is without merit. However, the response noted that the discussion of performance is the norm in considering a pay increase and, in this case, performance was, in fact, considered. Minutes of the closed session were included with the response.

The response also set forth the background concerning a April 17, 2007, meeting when the Commissioners considered a request from Alice Ritchie concerning a specific appeal of a Board of Zoning Appeals decision to the Circuit Court. According to the response, the status of the discussion as a personnel matter is the same as the discussion involving the County Attorney. The minutes of the April 17, 2007, public session reported on page 2 that the Commissioners approved Ms. Ritchie handling the appeal at the hourly rate of \$125; on page 5, the minutes reflected the additional information required following a closed session under the Act. The County Commissioners believe their method of reporting is consistent with the Act.

C. Analysis

A public body is entitled to close a meeting to consider "the appointment, employment, ... compensation, ... or performance evaluation of appointees, employees, or officials over whom it has jurisdiction; or ... any other personnel matter that affects 1 or more specific individuals[.]" §10-508(a)(1). To the extent that the discussion might involve a new contract or contract modification, it would be governed by the Act. §10-502(j)(3). However, there is no merit to the suggestion that compensation levels for individual attorneys

appointed by the County Commissioners could not properly be considered in closed session under §10-508(a)(1). *See 4 OMCB Opinions* 38, 40 (2004).

The written statement prepared in closing the session on May 6, which was described in the complaint, was not deficient because it failed to name the appointees whose compensation would be considered. As to the minutes reflecting actions taken during the closed session on April 17, 2007, we simply refer to our discussion of this issue, above.

IV

Contract Matters Generally

A. Complaint

Your complaint included a general allegation regarding contractual matters, namely, situations where contracts were approved by the County Commissioners that were “never discussed in open session (or in most cases, even alluded to in passing during the meetings.) They are merely reported in the minutes after the fact.” The complaint invited the Compliance Board to “examine the pattern of undiscussed and undisclosed – thus secret – contract approvals....”

B. Response

Given the extensive list of items attached to the complaint, the response addressed this allegation generally. The response reviewed the County’s governmental structure and noted that, each Tuesday, the Commissioners’ Executive Assistant assembles a packet of documents for the Commissioners’ signatures, including contracts. According to the response, under the County Code, it is often the County Administrator that has the responsibility to negotiate and/or review county contracts. As appropriate, other staff also may be involved in the negotiation and review of contracts. The County Attorney may also be consulted in connection with contractual matters. In some cases, staff have the authority to sign contracts; in other cases, the Commissioners sign contracts. According to the response, all contracts requiring the Commissioners’ signatures are signed in open meetings. Sometimes, Commissioners will have questions or comments and a discussion will occur. Other contracts are signed upon review without comment. All these contracts are reflected in the minutes. According to the response, “whether or not the Commissioners decide to engage in debate or discussion ... is not within the scope of the Act.” Allegations suggesting that the County “conceal[s]” matters

required to be publicly available is without merit; according to the response, all executed contracts are available for public inspection.

C. Analysis

As we have repeatedly held, the Act does not mandate that a public body make an agenda of its meetings available to the public in advance of a meeting, although it is a practice we have commended. *See, e.g., 4 OMCB Opinions* 168, 171-72 (2005). However, we have explained in other contexts that the Act is not satisfied if a meeting is open only in name, but not in reality. *4 OMCB Opinions* 67, 70 (2004). We have held that, “[a]t a minimum, a public body considering an item in open session must ensure that those observing the meeting have the same information that someone reading the minutes from the meeting would have.” *Id.* We can appreciate the frustration of the public witnessing the signing of multiple documents during the course of the meeting without any insight as to what is occurring.

To be sure, the Open Meetings Act does not require a public body to discuss any particular matter at a meeting. There is nothing in the Act that would preclude the Commissioners from employing a notation process whereby staff could collect the signatures of the Commissioners separately or expanding its delegation for signing contracts to a single official. However, if the Commissioners wish to sign contracts during the course of a public meeting, the public must be advised of the action being taken so that they are aware of the information that has traditionally been reported subsequent to the meeting through the minutes.⁵

V

Miscellaneous

The complaint included a long list of additional contractual matters which we were invited to explore. We decline the invitation, but we believe the discussion above should assist in ensuring compliance with the Act.

In a cover letter accompanying the response, the County Attorney noted that we have previously recognized that the right to file a complaint with the

⁵ One option the Commissioners might consider is the development of a consent calendar for routine contract approvals and similar actions carried out under the Act, but not expected to generate discussions, and share that information with those in attendance in order to avoid a delay in its proceedings.

Compliance Board “should be exercised ... only in good-faith that the Act was indeed violated, based on a reasonable inquiry into the available facts.” 3 *OMCB Opinions* 143, 144 (2001). The response questions whether this standard has been met.

As indicated by our discussion above, we would certainly not deem the complaint frivolous. However, many of the assertions in the complaint suggest requirements that have no basis under the Act. It is important to remember our role is to evaluate whether a public body has satisfied the minimum statutory requirements. We would request that future complaints be limited to the requirements of the Act. Arguments for changes in what the Act requires of a public body are more appropriately addressed to the Legislature.⁶

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire

Courtney J. McKeldin

Julio Morales, Esquire

⁶ After receipt of the response, you requested an opportunity to review the response. Although we received correspondence subsequent to that point from you and the County, none of it really affected the extensive record that had already been submitted. This process, as well as staff’s work load, extended the time frame for issuance of this opinion well beyond are normal practice.